

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 686 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

ASIMBHAI HAJIBAI UMRETHIA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 686 of 2002
MR SHAKEEL A QURESHI for Appellant No.
MR VM PANCHOLI ADDL PUBLIC PROSECUTOR for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

Date of decision: 12/01/2005

ORAL JUDGEMENT

1. This appeal under Section 374 of the Criminal
Procedure Code, 1973 (for short "Cr.P.C.") has been
preferred by the appellant (original accused) Asimbhai

Hajibhai Umrethia against the judgment of conviction dated 19.6.2002 rendered by the learned Sessions Judge, Rajkot in Sessions Case No.141 of 2001 convicting the present appellant for the offence punishable under Section 304 Part II of the Indian Penal Code and ordered to undergo R.I. of six years and fine of Rs.5000/-; in default of payment of fine, to undergo further S.I. for a period of one year. At the outset, it is pertinent to note that in the offence in question, in all there are two accused i.e. present appellant and his son Imran but the second accused Imram being the juvenile, the case of juvenile offender was ordered to be transferred to Juvenile Court, whereas the trial against the present appellant has been conducted and concluded by the learned Sessions Judge, Rajkot in Sessions Case No.141 / 2001 and awarded him conviction as stated above, which has given rise to filing of this appeal before this Court challenging the legality and validity of the order of conviction.

2. This appeal came to be admitted by this Court (Coram : A.L.Dave, J.) on 3.10.2002 and hearing of the appeal was ordered to be expedited. The order dated 3.10.2002 is reproduced as under :

"Appeal admitted and expedited. Bail refused.

Ld.Advocate Mr.Qureshi submits that the appellant will supply paper book. On such paper book being supplied, matter be circulated for final hearing. Mr.Abichandani, Ld.APP for State."

Having supplied the paper book to the Registry of this Court, this matter reflected in the board of final hearing for 21 times and lastly it has been reflected in the board of this Court for the 22nd time.

3. In order to appreciate rival contentions of the parties, necessary facts may, in brief, be stated.

It is the case of the prosecution as reflected from para-2 of the judgement that the present appellant original accused No.1 Asim Hajibhai Umrethiya and his son juvenile offender Imran were having lorry of light and heavy refreshment which was usually stalled near Rajkot Gondal by-pass highway. It is further the case of the prosecution that on 12.5.2001 at about 21.30 Hrs when the accused were present at the place of business, the deceased Dilavarsinh Surubha Jadeja who used to come to the lorry of the accused persons, came and asked for breakfast, which was denied by the accused persons on the ground to first clear outstanding amount which was due.

Denial of giving breakfast resulted into quarrel and led to scuffle and the accused in the process of scuffle, given blow by knife which is commonly used for the business carried out by the accused and thus, the accused had caused three to four blow injuries at the abdominal part of the body of the deceased Dilavarsinh, due to which, the victim deceased Dilavarsinh fell down and thereafter was taken to the restaurant known as Trilok Park Restaurant run by PW-1 Arunkumar Naranbhai Solanki, who called for an ambulance van in which the deceased was removed to the hospital where he was examined by the Doctor who found him dead and thereafter police was informed. A complaint came to be lodged against accused persons-present appellant and his son for the offence punishable under Sections 302, 34 and 188 and etc. of the IPC. The Investigating Officer started investigation and during the course of investigation, the present appellant and his son came to be arrested and sent to judicial custody. Inquest Panchanama and Panchnama of scene of offence were also drawn and Panchnama of dead body was also prepared. Post Mortem was performed on the dead body and the P.M. Note is on record of the case. Statements of various witnesses were also recorded and the same are also on record. The accused, so arrested, were sent to judicial custody and at the end of investigation, chargesheet was submitted. The accused No.2-Imram being a juvenile, his case has been transferred to Juvenile Court. For conducting the trial against the present appellant, he was produced before the Sessions Court concerned and the learned Sessions Judge had framed the charge against the appellant for the offence punishable under Sections 302 read with Sections 34 and 188 etc of IPC and Section 135 of the Bombay Police Act. Since the accused not pleaded guilty to the offence charged against him, and requested for trial, to prove the guilt against him, the prosecution has proceeded with the trial.

4. During the course of trial, the prosecution has examined the documentary evidence and also examined in all ten witnesses as under :

PW-1 Arunkumar Naranbhai Solanki Exh.9
PW-2 Dr.Ganeshbhai Pyarelal Govekar - Exh.10
PW-3 Jayeshbhai Dhirajalal Exh.12
PW-4 Nayanbhai Hasmukhbhai Exh.14
PW-5 Keshubhai Damjibhai Exh.16
PW-6 Mayursinh Mohansinh Jadeja Exh.18
PW-7 Kanjibhai Bhikhabhai Exh.22
PW-8 Bakulbhai Pranlalbhai Exh.24
PW-9 Hanifbhai Husanbhai Exh.27

Thereafter, the prosecution had produced the following documentary evidence to substantiate the charge against the accused.

1. FIR Exh.19 filed by Mayursinh Mohansinh Jadeja.
2. Postmortem report Exh.11
3. Inquest Panchnama Exh.15
4. Panchnama of scene of offence Exh.17
5. Arrest Panchnama of the accused Exh.23
6. Discovery Panchanama Exh.25
7. Yadi for making postmortem examination Exh.30
8. Seizure panchanama of cloths of deceased Exh.31
9. Forensic Science Laboratory report Exh.32 to 35.
10. Statement of Imram Asimbhai Exh.37.

On submission of closing Purshis, further statement of the accused under Section 313 of the Cr.P.C. was recorded and after hearing the learned advocates for the respective parties, the Court below has believed the case of the prosecution to the extent of awarding punishment under Section 304 Part-II of the IPC and convicted the accused - present appellant accordingly.

5. I have heard the learned advocate Mr.Qureshi for the appellant and the learned APP Mr.V.M.Pancholi for respondent - State.

6. The learned advocates for the appellant has taken me through the documentary evidence as well as oral evidence, more particularly, the evidence of the eye witnesses PW-1 Arunkumar Naranbhai Solanki Exh.9, PW-3 Jayeshbhai Dhirajlal Exh.12, PW-2- Dr.Ganeshbhai Pyarelal Govekar Exh.10 who had performed the post mortem on the dead body of the deceased victim, so also, the P.M. note Exh.11 as well as the recovery panchanama Exh.25. It is mainly argued that the above referred witnesses are not witnesses of incident but got up witnesses and have been cited as witnesses later on just to prove the case against the appellant. It is argued that the injuries mentioned in Column No.17 of the P.M. Note are required to be proved. Simultaneously, it is also argued that from the evidence of Dr.Govekar, it does not appear to be a case of injury on vital part of the body and hence, the Court ought not to have come to the conclusion that the offence in question falls under Section 304 Part-II of the IPC but at the most, under Section 324 of the IPC. It is also argued that it is not pre planned incident but for the sake of the argument if it is believed, then also, it is an incident of scuffle took place all of

sudden and therefore, it was required to be appreciated in that spirit. The present petitioner is having wife, three daughters and two sons and all three daughters are of marriageable age and there is no other earning member in the family. It is submitted that the appellant has already undergone sentence for more than three years and seven months and even his conduct inside and outside jail is good. Looking to the peculiar facts and circumstances of the case, the sentence awarded by the court below is on higher side and therefore, it is requested that if the sentence is reduced to the extent which is already undergone by the appellant by this time, it would meet the ends of justice. To substantiate the stand of the appellant, reliance is placed on a decision of the Hon'ble Supreme Court in case of KULDEEP SINGH V. STATE OF HARYANA (1996 SCC (Cri) 510).

7. On the other hand, learned APP Mr.Pancholi has taken me to the evidence of the eye witnesses PW-I and PW-3, to argue that they are witnesses of the incident. Relying on the evidence of the aforesaid witness i.e. PW-I Arunkumar Naranbhai Solanki Exh.9, it is argued that the said witness is having restaurant just opposite to the scene of offence in the name and style of "Trilok Park" and at the time of incident, when the deceased fell down, he was taken to his restaurant and the witness had called for the service of ambulance and thereafter, sent the victim to hospital. Therefore, it is argued that it cannot be said that the said witness is a chance witness and not an eye witness of the incident in question. It is further contended that in the similar manner PW-3 Jayeshbhai Dhirajlal Exh.12 is also a witness and nothing adverse has come out in his cross examination affecting the case of the prosecution.

8. The learned APP has also taken me to the P.M.Note and relying on the oral evidence of the Doctor, it is argued that the injuries sustained by the victim are on vital part of the body inasmuch as all three injuries are on abdominal part. He has also taken me through the recovery panchanama which clearly says that the Mudamal knife has been recovered from the accused and as per the Panchanama, the same was found with blood stains and the same has been proved by the FSL also. Relying on the same, it is argued that it is a case wherein the prosecution is able to prove the guilt on the part of the appellant-accused beyond all reasonable doubts. It is, therefore, argued that on the contrary, though it was a case of commission of offence attributing provisions of Section 302 of IPC, yet the State has not preferred any appeal and therefore, according to him, it is a clear

case of enhancement of sentence.

9. I have gone through the evidence which are on record of the appeal and also gone through the judgment under appeal. This Court has also considered the respective submissions advanced by the learned advocates for the parties and also gone through cited decision. It is not disputed that the incident in question had taken place all of sudden. Firstly it was a scuffle which ultimately resulted into an offence punishable under Section 302 of IPC. I have gone through the medical evidence showing the injuries sustained by the deceased and the oral evidence given by the Doctor. The P.M. Note also clearly reflects the said injuries, more particularly in Column No.17, and the corresponding injuries in Column No.21. Taking into consideration the totality of the facts and circumstances of the case, in my opinion, the Court below has rightly come to the conclusion that the prosecution was able to prove the case against the appellant beyond all reasonable doubts. On the contrary, the Court below has rightly considered the case of the prosecution in true spirit of the incident and since it was an incident resulted out of sudden provocation of moments, the court below, instead of holding the appellant guilty of an offence punishable under Section 302 of IPC, has rightly held the appellant guilty and convicted under Section 304 Part-II of IPC and awarded punishment of six years R.I. Therefore, the submission of Mr.Qureshi relying on the cited decision of the Apex Court referred to above, does not bear any substance and the same does not deserve to be accepted. It is the contention of Mr.Qureshi that the statute provides for maximum punishment upto R.I. for 10 years but the descending limit is not provided and therefore, the sentence already undergone by the appellant may be treated to be just and proper sentence and the appellant may be ordered to be set at liberty. Looking to the facts and circumstances of the case and the prosecution case, so also the number of injuries sustained by the deceased victim, in my view, it is not case of single blow. Looking to three main injuries sustained on vital part, prima facie, it cannot be said that the intention was not to kill the victim. On the contrary, three injuries on the vital part of the body of the victim resulted into an offence punishable under Section 302 of IPC. Ultimately, it is the discretion of the concerned Sessions Judge, to exercise the powers and decide the quantum of punishment in the facts and circumstances of the case in accordance with law. This Court is in full agreement of the ratio discussed in the cited decision. But looking to the facts and circumstances of the case on

hands, in my opinion, the cited decision would not be of any assistance to the case of the appellant. Therefore, keeping in mind all the aspects of the matter, this Court is of the opinion that the Court below has taken lenient view in the matter bearing in mind the fact of all of sudden incident and rightly held the appellant guilty of an offence punishable under Section 304 Pt.II of IPC and awarded sentence of six years which, in my opinion, is just and proper and does not warrant any interference even on the grounds of sympathetic consideration of the three daughters of the appellant reaching marriageable age and the appellant having family responsibility with no other earning member in the family. The Court below has also rightly appreciated the interest of all and the age of the victim who was of 35 years at the time of incident leaving behind widow and children. Therefore, on all counts, no interference of this Court is warranted and hence, the appeal deserves to be dismissed.

10. In view of my aforesaid discussion, there is no substance in the present appeal and the same fail. Accordingly, the present appeal is dismissed.

Date : 12.1.2005 [R.P.Dholakia, J.]

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